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SUBJECT: PARLIAMENT AMENDS CONSTITUTION, OUSTS ELECTORAL COMMISSION

REF: A. NAIROBI 2747

[1](#)B. NAIROBI 2221

[1](#)C. NAIROBI 1698

SUMMARY

[1](#)1. Parliament on December 16 passed the Kenya Constitution Amendment Bill of 2008 (the Amendment). The Amendment follows the recommendations of the Kriegler Commission (Reftel B) and abolishes the Electoral Commission of Kenya (ECK), which was widely discredited for its mishandling of Kenya's 2007 general elections. It also removes the ECK's 22 commissioners from office. The Amendment creates an Interim Electoral Commission (IEC) to prepare the groundwork for, and administer, a referendum on a new constitution. Passage of the Amendment was delayed by nearly one week as Parliament demanded that it play a lead role in nominating IEC commissioners and that nearly 600 ECK staff be absorbed into the civil service. We expect President Mwai Kibaki to sign the Amendment into Law. Passage of the Amendment completes the legislative framework that is a prerequisite for writing a new constitution. Parliament earlier this term passed a Bill outlining the roadmap to a new constitution (Reftel C), one of key tasks facing the Grand Coalition government, which President Kibaki has signed into law. The Ambassador met with the Minister of Justice, National Cohesion, and Constitutional Affairs on December 19 to indicate that we are willing to consider providing electoral support. The Minister was receptive in principle, and we are following up with her team. End Summary.

THE AMENDMENT

[1](#)2. Parliament passed the Kenya Constitution Amendment Bill of 2008 (the Amendment) on December 16. The Amendment abolishes the Electoral Commission of Kenya (ECK), which was widely discredited for its mishandling of Kenya's 2007 general elections, and removes the ECK's 22 commissioners from office. It provides that the nearly 600 regular ECK staff will be absorbed into the civil service. The ECK will be replaced by an Interim Electoral Commission (IEC). The IEC will be a leaner body of between five and nine commissioners. It is tasked with administering the national referendum on a new constitution, a key pillar of the National Accord and Reconciliation Act of 2008. The IEC is also tasked with updating and correcting the voters' register, which the Kriegler Commission criticized for being inaccurate and contributing to voter fraud (Reftel B). IEC commissioners will be appointed after a public application

process overseen by a Parliamentary Select Committee (PSC). The IEC will operate for no more than 15 months or until it organizes the referendum on a new constitution, whichever comes first.

¶3. The Amendment also establishes an Independent Boundaries Review Commission to redraw constituency boundaries to reduce disparities in the number of registered voters per parliamentary constituency (Note: Kenya's smallest parliamentary constituency in terms of the number of registered voters has approximately 10,000 voters. The largest has approximately 150,000 voters. End Note.) The members of the Boundaries Commission will also be chosen after a public application process overseen by the PSC. The Amendment also creates an Independent Constitutional Dispute Court to handle any legal disputes arising from the constitutional referendum. The President will make appointments to the IEC and Boundaries Review Commission in consultation with the Prime Minister. The President will appoint members of the Dispute Resolution Court in consultation with the Prime Minister and the Chief Justice.

PARLIAMENT DEMANDS A ROLE

¶4. Passage of the Amendment was delayed by Parliament's demands that it lead the nomination process for commissioners of the IEC and the Interim Boundaries Review Commission. The Amendment initially envisioned that the so-called Serena team (eight Cabinet Ministers who negotiated the National Accord

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and Reconciliation agreement that ended Kenya's post-election crisis) would nominate IEC commissioners. A bloc of Members of Parliament (MPs) were also adamant that the nearly 600 ECK staff should not be fired along with the ECK Commissioners. A bloc of MPs stated that they would vote the Amendment down if these demands were not met. (Note: Rules of Parliament forbid legislation that is defeated in a floor vote from being reintroduced for six months. If the Amendment had been defeated, constitutional reform would have been seriously delayed. End Note.) President Kibaki and Prime Minister Raila Odinga held three informal meetings with MPs to find a compromise solution. Ultimately, the government agreed that the PSC would oversee the nomination of commissioners and that regular ECK staff would be absorbed into the civil service, allowing Parliament to adopt the Amendment before it recessed for the holidays.

ECK TO CHALLENGE SACKING

¶5. Local media have reported that the ECK commissioners intend to file a lawsuit challenging their dismissal. They will argue that Parliament had no right to fire the commissioners through a constitutional amendment, but that it should have convened individual tribunals for each of the 22 commissioners to determine whether they had committed offenses that could justify the dismissal of individual commissioners. This challenge is unlikely to succeed, as Parliament appears to have properly exercised its legislative powers to amend the constitution. (Comment: ECK Commissioners, if they had not been fired, would have earned between USD 4,000-6,000 per month, plus allowances over the next 4 years. Thus, ECK commissioners are likely filing this lawsuit to give them leverage to seek a financial settlement from the government rather than in expectation of successfully defending their jobs. End Comment.)

COMMENT

¶6. The ECK's dismal performance in the 2007 elections

required that it be disbanded. President Kibaki's firm support for electoral reform gives us confidence that he will sign the Amendment into law. We welcome the move to replace the ECK with a body whose commissioners will be selected through a transparent application process, which is an improvement over the "gentlemen's agreement" which previously governed the appointment of ECK commissioners. (Note: Traditionally the President was required only to "consult" with the opposition in selecting commissioners. However, President Kibaki appointed commissioners preceding the 2007 general elections without consultation. End Note.) End Comment.

RANNEBERGER